United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2077

To be submitted

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2077

VICTOR PANICA,
Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

THOMAS M. FORTUIN,
AUDREY STRAUSS,
Assistant United States Attorneys, Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITIES CITED

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2077

VICTOR PANICA,
Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,
Respondent-Appellee.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Victor Panica appeals from an order filed March 18, 1976 in the United States District Court for the Southern District of New York by the Honorable Lee P. Gagliardi, United States District Judge, denying without a hearing Panica's second petition to vacate his conviction and sentence pursuant to Title 28, United States Code, Section 2255.

Indictment 72 Cr. 313, filed March 17, 1972, charged the appellant Panica, Albert Pierro, Nicholas Christophe and Frank DeSimone with the possession of 39.8 pounds of heroin with intent to distribute and with conspiracy to do so in violation of Title 21, United States Code, Sections 812, 841 and 846.

On April 26, 1972, Pierro pleaded guilty. On the same day Christophe waived his right to a jury trial and agreed to proceed to trial before Judge Gagliardi on the basis of the record developed in a pretrial suppression hearing. The case against Christophe was therefore severed from the jury trial of Panica and DeSimone which began that day. On April 28, 1972, at the end of the Government's case, the Court granted DeSimone's motion for a directed verdict of acquittal. On May 2, 1972, the jury returned guilty verdicts against Panica on both counts of the indictment.

Thereafter, Pierro moved to withdraw his guilty plea and that motion was granted. Pierro then waived his right to trial by jury and was tried jointly with Christophe by the court, which found them both guilty.

On June 20, 1972, Panica, Pierro and Christophe were sentenced. Panica was sentenced to a jail term of twenty years.

All three convictions were affirmed by this Court, *United States* v. *Christophe*, 470 F.2d 865 (2d Cir.) and the Supreme Court denied *certiorari*, 411 U.S. 964 (1972).

On March 25, 1974 Panica filed a motion for a new trial on the basis of newly discovered evidence, pursuant to Rule 33, Federal Rules of Criminal Procedure, and a petition for a writ of habeas corpus pursuant to Title 28, United States Code, Section 2255. The basis for this motion and petition was Panica's claim that his co-defendant Christophe was prepared to exculpate Panica but was deterred from doing so because he was threatened by former Assistant United States Attorney Walter J. Higgins, Jr. On November 25, 1974, Judge Gagliardi denied the motion holding that the affidavits submitted by Panica in support of the motion and petition contained merely hearsay and conclusory statements which were insufficient

to warrant relief. On May 14, 1975 this Court affirmed Judge Gagliardi's order in open court, *United States* v. *Panica*, 516 F.2d 897 (2d Cir. 1975).

On November 21, 1975, Panica, proceeding *pro se*, filed a second petition for relief, 75 Civ. 5897, pursuant to Title 28, United States Code, Section 2255, again alleging as in the first petition that Assistant United States Attorney Higgins had prevented Christophe from testifying in his behalf. In addition, the second petition alleged that Panica's trial counsel had a conflict of interest in the case and that the district court should have conducted an inquiry to determine if any such conflict existed. In an opinion filed on March 18, 1976, Judge Gagliardi denied Panica's second petition on the grounds that "essentially, the petitioner is attempting to reassert and relitigate issues which have been decided adversely to him by this Court in a previous motion. . . ." This appeal followed.

The Facts

The facts proved at trial are set forth in this Court's opinion, *United States* v. *Christophe*, 470 F.2d (2d Cir.), *cert. denied*, 411 U.S. 964 (1972).

The first issue presented upon this appeal consists of a repetition of Panica's initial motion for a new trial and petition for a writ of *habeas corpus* and, accordingly, the facts presented in that motion and petition must be reviewed again here. Panica's first petition was supported by an attorney's affidavit, an unsworn statement by an unidentified employee of the Federal House of Detention, and a sworn statement by Panica's co-defendant Albert Pierro. The attorney's affidavit merely set forth some of the trial evidence against Panica and then went on to speculate that

co-defendant Christophe may have been an informant "spying" on the defense camp (GA. 3-6).*

The unsworn handwritten statement by the unidentified person alleged to be an employee of the Federal House of Detention stated that while Christophe was incarcerated at the House of Detention, the employee came upon Christophe crying in his cell. The employee asked Christophe if anything was wrong. Christophe replied that "if he had testified at the trial of Panica, Panica would not be in jail today." The statement further quoted Christophe as saying that "the United States Attorney had told him [Christophe] that if he took the witness stand to clear Panica, he, the United States Attorney, would prosecute him for bank robberies." (GA. 7-9).

Finally, Pierro swore in his affidavit that prior to the two trials in this case he had overheard conversations between Panica and Christophe in which Christophe told Panica that "when the proper time arrived he would take the witness stand and exonerate Victor Panica from any guilt." Pierro also stated that Christophe had told him personally, "outside of Panica's hearing range that he [Christophe] would do anything Mr. Higgins [the Assistant United States Attorney then in charge of the case] told him so long as Mr. Higgins promised him that he would be allowed to visit his sick daughter." Pierro further stated that he had previously remained silent on the subject because he feared reprisals from the United States Attorney's Office. (GA. 26-27).**

---

* "A." refers to pages of Panica's appendix, "GA." to pages of the Government's appendix.

** In opposition to the motions the Government submitted, among other things, a sworn affidavit of former Assistant United States Attorney Walter J. Higgins, Jr., (GA. 21-22) categorically denying that he had made any of the threats that were

[Footnote continued on following page]

On November 25, 1974, Judge Gagliardi denied the motion in a memorandum opinion, (GA. 28-30), holding that "the affidavits submitted by Panica are not sufficient to warrant relief because they do not qualify as proper evidentiary material to support" either the motion or the petition in that the affidavits contained merely hearsay allegations which would not be admissible at a hearing. On May 14, 1974, this Court affirmed Judge Gagliardi's denial of Panica's motions. 516 F.2d 897.

On November 21, 1975, Panica, this time proceeding *pro se*, filed a new petition pursuant to Title 28, United States Code, Section 2255. In support of the petition, Panica submitted his own affidavit and three additional affidavits: (1) the affidavit of Stanley M. Meyer, Esq., one of the attorneys who represented Panica on the first petition; (2) an affidavit from Meyer's investigator, Herman Race; and (3) the affidavit of Lieutenant Carter, a lieutenant of guards at the Federal House of Detention.

The affidavits from Meyer and Race do little more than identify the previously unidentified employee at the federal House of Detention as Henry McGowan. Meyer's affidavit reveals that McGowan appeared at Meyer's law office about four months after signing the unsworn statement and stated "that some parts of his statement may not have been true. . . ." Meyer goes on to attest that McGowan "then changed his mind and said they were true after all." (GA. 41). Race's affidavit merely recites the circumstances under which he took the unsworn statement from McGowan. (GA. 43-44). The last document

---

alleged. Judge Gagliardi's opinion denying the first motion, (GA. 28-30), made it clear, however, that the court did not take this affidavit into account in denying the motion, as arguably it could not, *Taylor* v. *United States*, 487 F.2d 307 (2d Cir. 1974). *But see, United States* v. *Franzese*, 525 F.2d 27 (2d Cir. 1975); *Dalli* v. *United States*, 491 F.2d 758, 762 n.4 (2d Cir. 1974).

submitted purports to be the affidavit of Lieutenant Carter, a lieutenant of the guards at the Federal House of Detention.* This document states that during Christophe's incarceration at the Federal House of Detention, he told Carter that "he was being threatened by Assistant United States Attorney Hicks (Higgins?) with being arrested and prosecuted for a number of bank robberies." In addition, the document contains a claim that "Mr. Christophe also stated that he was being pressured by Mr. 'Hicks' to testify against a Mr. Gino [presumably attorney Gino Gallina] who was his friend." (GA. 45-46).

In support of his second claim in this petition, Panica submitted his own affidavit (GA. 32-35) alleging in conclusory terms that his trial attorney, Gino Gallina, Esq., had a conflict of interest in the case because Gallina's partner, Jeffrey C. Hoffman, Esq., represented his co-defendant Christophe at a separate trial on the same indictment. Although Gallina had represented Panica during his trial, Panica was also represented at trial by Vincent Lanna, Esq., an attorney who was not associated with Gallina's firm. Upon his direct appeal, Panica was represented by Jay Goldberg, Esq. and Gretchen White Oberman, Esq., who have no connection with Gallina's law firm. Although he claims that Gallina conducted his defense while having a conflict of interest, Panica does

---

* The copy of this purported affidavit which was served on the United States Attorney's Office bears no signature, original or conformed, nor does it show that it was notarized. The date typed at the end of the affidavit is "June 1973." Our efforts to locate the copy filed in the district court have been unsuccessful and, accordingly, we are unable to determine whether a signed and sworn affidavit from Lieutenant Carter exists.

If it does exist and if it bears the June, 1973 date which exists on the copy in our possession, it would appear that this document was withheld at the time of the submission of Panica's first petition for a writ of *habeas corpus*.

not specify any prejudice resulting from the joint representation.*

ARGUMENT

POINT I

The District Court Properly Denied Without a Hearing Panica's Petition Based on a Claim That Christophe Was Coerced.

In his second petition pursuant to 28 U.S.C. § 2255, Panica again attempts to raise the claim that his co-defendant Christophe would have testified for Panica but was prevented from doing so by threats from the Assistant United States Attorney in charge of the prosecution of his case. As in the first petition, Panica has merely submitted affidavits containing hearsay statements and conclusory claims. Indeed, the affidavits of his attorney, Meyer, and Meyer's investigator, Race, add nothing whatsoever to the first petition. They merely recite the double hearsay that McGowan, an employee at the Federal House of Detention, heard Christophe say that he was coerced by the prosecutor. Carter's affidavit (assuming that such exists as a signed and sworn statement) is again merely a hearsay statement with respect to any allegation that Christophe was coerced. None of these hearsay attestations would be admissible at a hearing and, accordingly, the district court properly denied relief without a hearing. *Dalli* v. *United States*, 491 F.2d 758, 760 (2d Cir.

---

* In this affidavit Panica alleged a further so-called "conflict of interest" in that Gallina had himself been investigated by a Grand Jury sitting in the Southern District of New York. (GA. 33). There is no evidence with respect to this contention in the record below and Panica has apparently abandoned it on appeal.

1974); *D'Ercole* v. *United States*, 361 F.2d 211, 212 (2d Cir.), *cert. denied*, 385 U.S. 995 (1966).

Likewise, nothing has been added to the previous record, which failed to specify the purported testimony that Christophe would give. Again, the statement attributed to Christophe by hearsay is merely his estimation that "if he had testified at the trial, Panica would not be in jail" (GA. 8). Where such vague and conclusory claims are made, even if not hearsay, a hearing need not be granted. *Michel* v. *United States*, 507 F.2d 461, 464 (2d Cir. 1974); *Dalli* v. *United States*, *supra*, 491 F.2d at 760; *O'Neal* v. *United States*, 486 F.2d 1034, 1036 (2d Cir. 1973); *United States* v. *Miranda*, 437 F.2d 1255, 1258 (2d Cir. 1971).

We again point out, as we did in the appeal from denial of the first petition, that Panica's claim that Christophe could or would testify in his behalf is a highly dubious one. Prior to trial Panica had sought a severance on the ground that Pierro, DeSimone and Christophe would testify in his behalf if he were not tried jointly with them. (GA. 11-14). Although Panica's severance motion was denied, both Pierro and DeSimone were available to be called in Panica's defense, Pierro having pleaded guilty and DeSimone having been acquitted. However, neither was called by Panica, who chose instead to try to call Christophe, the only defendant who was then in a position to assert his Fifth Amendment privilege, which Christophe proceeded to do.

Thus, it is not surprising that Panica is unable to come forward with anything more than hearsay affidavits to support his claim of threats and of Christophe's ability to exonerate him. The trial record reflects that the impediment to Panica's effort to call Christophe was Chris-

tophe's assertion of his Fifth Amendment privilege, not threats by the prosecution. The record further shows that the two co-defendants who were available to be called for Panica's defense were not called, despite the earlier sworn statement that they were prepared to exonerate him.

Finally, all this was previously before the district court and this Court in virtually the identical posture. Although new affidavits were filed, they were again hearsay and conclusory. The district court was fully justified in denying the petition as an attempt to relitigate an issue previously decided against the petitioner. (A. 9-10). *See generally, Sanders* v. *United States*, 373 U.S. 1, 15-17 (1963).

POINT II

Panica is Foreclosed from Raising the Claimed Conflict of Interest of One of His Trial Attorneys, and, in Any Event, That Claim Is Meritless.

Panica's second claim is that one of his trial attorneys, Gino Gallina, Esq., had a conflict of interest because Gallina's partner, Jeffrey Hoffman, Esq., represented Panica's co-defendant Christophe. This claim was never raised by Panica upon his direct appeal, when he was represented by counsel other than his trial counsel. If Panica suffered any prejudice by virtue of Gallina's representation of him, his appellate attorneys could have raised the issue in the direct appeal from his conviction. Their failure to do so precludes review by collateral attack; it is settled "that the writ of *habeas corpus* will not be allowed to do service for an appeal." *Sunal* v. *Large*, 332 U.S. 174, 178 (1947). *Accord, Davis* v. *United States*, 411 U.S. 233, 239-42 (1973); *United States* v. *Wright*, 524 F.2d 1100, 1101-02 (2d Cir. 1975); *United States* v. *Natarelli*, 516 F.2d 149,

152 n.4 (2d Cir. 1975); *United States* v. *Travers*, 514 F.2d 1171, 1176-77 (2d Cir. 1974); *United States* v. *West*, 494 F.2d 1314 (2d Cir.), *cert. denied*, 419 U.S. 899 (1974). The rule requiring that issues available upon direct appeal be raised at that time is not, as Judge Friendly pointed out in *United States* v. *Sobell*, 314 F.2d 314, 324-25 (2d Cir.), *cert. denied*, 374 U.S. 857 (1963), merely a technical requirement. Rather, it is a protection against interminable litigation in criminal cases and against the ordering of new trials years after events in issue, when if a new trial had been needed, it could and should have been ordered immediately following the direct appeal of the case.

However, even if Panica's claim were considered on its merits, it would not require the granting of the writ. In order to succeed on this issue, Panica would have to show that a conflict of interest existed which amounted to a denial his Sixth Amendment right to effective assistance of counsel and, to make that showing, specific prejudice must be demonstrated. As this Court stated in *United States* v. *Lovano*, 420 F.2d 769, 773 (2d Cir.), *cert. denied*, 397 U.S. 1071 (1970):

> The rule in this circuit is that some specific instance of prejudice, some real conflict of interest, resulting from the joint representation must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel. (Citations omitted).

Accord, United States v. *Mari*, 526 F.2d 117, 119 (2d Cir. 1975); *United States* v. *Vowteras*, 500 F.2d 1210, 1211 (2d Cir.), *cert. denied*, 419 U.S. 1069 (1974); *United States* v. *Wisniewski*, 478 F.2d 274, 281 (2d Cir. 1973); *United States* v. *De Berry*, 487 F.2d 448, 452 (2d Cir. 1973); *United States* v. *Alberti;* 470 F.2d 878, 881 (2d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973); *Morgan* v.

United States, 396 F.2d 110, 114 (2d Cir. 1968); *United States* v. *Goldberg*, 401 F.2d 644, 648 (2d Cir. 1968), *cert. denied*, 393 U.S. 1099 (1969); *United States* v. *Dardi*, 330 F.2d 316, 335 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964); *United States* v. *Bentvena*, 319 F.2d 916, 937 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963).

Panica has failed to specify any prejudice resulting from the joint representation. He attempts to suggest that a conflict arose when he called Christophe as a witness. However, since Christophe asserted his Fifth Amendment privilege and would not testify, Panica's attorney never faced the problem of cross-examining his law partner's client. The mere fact that a jointly represented co-defendant declines to testify is not a circumstance creating a conflict of interest. *United States* v. *Lovano*, *supra*, 420 F.2d at 774.

Although this Court has stated that the district court should make a full inquiry where it appears that joint representation may result in a conflict of interest, *United States* v. *De Berry*, *supra*, no such situation presented itself here. Unlike most of the cases where this issue has arisen, Panica and Christophe were not represented by the same attorney; they were represented by attorneys who were law partners. In addition to this attenuation of any possible conflict, Panica and Christophe were tried separately, further removing any potential conflict from the conduct of Panica's defense. Finally, Panica was represented at trial not only by Gallina but also by Vincent Lanna, Esq. who had no association with Gallina's firm and who was co-counsel throughout the trial. In these circumstances the joint representation did not present a potential conflict as to which an inquiry was required.

CONCLUSION

The order of the District Court denying without a hearing the petition pursuant to 28 U.S.C. § 2255 should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

THOMAS M. FORTUIN,
AUDREY STRAUSS,
Assistant United States Attorneys, Of Counsel.

★ U. S. Government Printing Office 1976— 714—017—732

Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

THOMAS M. FORTUIN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the ~~30th~~ 29 day of October, 1976 he served a copy of the within Brief by placing the same in a properly postpaid franked envelope addressed:

TMF

VICTOR PANICA
Box PMB-74678-158
Atlanta, Georgia

An deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Thomas M. Fortuin

THOMAS M. FORTUIN
Assistant United States Attorney

Sworn to before me this
~~30th~~ 29 day of October, 1976.

Maria A. Israelian

MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4521851
Qualified in New York County
Term Expires March 30, 1978